

STATE OF VERMONT
DEPARTMENT OF EDUCATION

Special Education Due Process 09-11

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PROCEDURAL HISTORY

1. Parent filed her due process complaint on May 8, 2009. The District filed its Response on June 1, 2009.
2. At the initial telephone conference on May 18, 2009, the parties agreed that they would attempt to mediate the dispute. In the First Scheduling Order, dated May 27, 2009, the Hearing Officer set the Pre-Hearing Conference for June 24, 2009, and the dates of hearing for July 30 and 31, 2009. Dates for the Complainant's Detailed Written Statement and the District's Statement of Defenses, the 5 day Rule exchange of evidence, submission of affidavits to be used at hearing, post-hearing submissions and the Decision and Order were also set. The Order stated that the parties would be allowed to submit supplemental witness lists and proposed exhibits by the date of the five day rule, July 22, 2009.
3. Pursuant to VDE Rule 2365.1.6.7(b)(8)(iii), the hearing was scheduled for two days: the first day for the Parent's evidence; the second day for the District's evidence. Neither party requested a longer period of time, and neither party requested an opportunity to show cause why a longer period was required. **First Scheduling Order, dated May 27, 2009.**

4. The Order states that Parent "...shall present her case first. It is expected that [Parent] will present her case, including cross-examination by the District, on the first day of hearing; District will present its case, including cross-examination by the [Parent] on the second day of hearing." Id.

5. Parent filed her Detailed Written Statement on or about June 21, 2009. The District filed its Written Statement of Defenses on June 24, 2009.

6. The Pre-Hearing Conference was held in Bethel, Vermont, on June 24, 2009, with the parties and Hearing Officer in attendance. During the Pre-Hearing Conference, the Hearing Officer reminded Parent that the burden of proof would be on Parent as complaining party. This Hearing Officer called to Parent's attention the fact that the District had set out in its Written Statement of Defenses a summary of the proof the District believed would be necessary to meet that burden. At this time, and at subsequent times during the process, the Hearing Officer reminded Parent of this burden, and urged her to focus on submitting whatever evidence she had that she felt would prove the facts needed to meet this burden, and that there might be areas where she disagreed with the District that would not be relevant to her case.

7. At the Pre-Hearing Conference, there was a lengthy exchange between the Hearing Officer and the parties, clarifying procedures to be followed by the Parent if and when she decided that she wanted to call witnesses on her witness list who were either District employees or consultants being paid by the District. Parent was to let District counsel know if she wished to call any of its employees (as opposed to outside

consultants) on her list, so the District could make arrangements for the witness to be available.

8. Parent was also informed that it was her responsibility to make arrangements directly with outside consultants and any other witnesses on her list whom she wished to call who were not employees of the District. This was restated in two follow-up phone conferences on July 13th and 17th, 2009 among the Hearing Officer, Parent and Counsel for the District.

9. A Pre-Hearing Conference Order ("PHC Order") was issued on June 24, 2009. The issues for hearing were summarized in the Pre-Hearing Order as follows:

a. Whether the services provided by district have been in substantial compliance with the student's current IEP, and, if not, what are the appropriate remedies, including but not limited to compensatory services.

b. Whether student's current IEP was developed in substantial compliance with procedural requirements and protections, and, if not, what are the appropriate remedies.

c. Whether the Student's IEP is reasonably calculated to enable the Student to receive meaningful educational benefit in the least restrictive environment, and, if not, what are the appropriate remedies.

10. The PHC Order also stated that the Hearing Officer could exclude records at hearing not disclosed pursuant to the procedures described therein and the VDE Rules.

11. The Hearing Officer granted a request by Parent, made on or about July 17, 2009, (7-21-09, p. 84, line 22) to allow Parent's witness, Linda Mulley, to testify prior to

hearing, on grounds that Mulley would be out of State on the dates of hearing. Ms. Mulley testified on July 21, 2009, from 3:09 p.m. to 6:11 p.m. The exhibits introduced by Parent in the course of the Mulley testimony were first disclosed to the District on the day of Mulley's testimony. **7-21-09, p. 4, ll. 5-19.**

12. Despite the Hearing Officer's repeated cautions and despite the explicit provisions of the First Scheduling and Pre Hearing Orders, at hearing Parent offered and introduced records not previously produced to the District, and submitted lengthy testimony that was in large part unrelated to the claims and issues in the case

13. Ample latitude was afforded Parent in her presentation of her case.

a. Though instructed that re-direct questioning must be limited to the subject matter brought up on cross-examination, **7/21/09, p. 16, ll. 9-12**, Parent was granted latitude during subsequent witnesses' testimony to ask questions on redirect beyond the scope of the initial direct and cross-examination. **7/31/09, pp. 105-106.** For example, Parent's redirect of Kristi Lenart was permitted to open a new line of questioning. **7/30/09, p. 228, ll. 1-8.** On this occasion and throughout her case, the Hearing Officer provided the Parent, as a pro se litigant, ample latitude to present whatever evidence she wished to have considered. **7/21/09, p. 26, ll. 7-9; p. 32, ll. 4-6; 7/30/09, p. 14, line 22; p. 37, ll. 6-9; 8/4/09, pp. 7-12; p. 224, line 22.**

b. Parent was permitted to call as her witnesses two witnesses whom Parent had never contacted prior to hearing to arrange testimony, Maureen Nevers and Andy West. **7/30/09, pp. 245-246; p. 247, line 11; p. 248.**

c. As noted above, the Hearing Officer repeatedly cautioned Parent that she needed to keep in mind the points she wished to prove; nevertheless, Parent was granted the opportunity to pursue almost any line(s) of questioning she wished, for each of the nine witnesses who testified over the course of three plus days of hearing, almost all of which was devoted to the presentation of Parent's case. **7/21/09, p. 51-52; 7/30/09, p. 15, ll. 2-6; p. 78, ll. 11-18; pp. 124-126; pp. 156-158; p. 168, ll. 11-15; p. 172, ll. 20-22; pp. 399-400; p. 409; pp. 464-466.** This is evidenced by the Parent's lengthy examinations of witnesses Lenart, Trask and Miller, who had little or no knowledge material to the issues.

d. Parent, as a pro se litigant, was also held to a relaxed version of the evidentiary standards used in administrative hearings. **7/30/09, p. 14, line 22, p. 28, line 16, p. 37, ll. 6-9, pp. 378-381; 8/4/09, p. 207, ll. 2-14.** Despite this leeway, Parent failed to introduce evidence which would support a finding of a denial of FAPE, failure to implement the IEP, failure to identify, failure to evaluate or failure to determine eligibility by the District.

14. Despite repeated reminders about wise use of time, and repeatedly setting and extending deadlines for finishing her case, Parent did not close her case until Tuesday, August 4, at 4:43p.m. **7-30-09, p. 15, ll. 1-11; p. 67, ll. 3-13; pp. 123-127; p. 203; p. 207, ll. 15-25; p. 208, line 12; 8/4/09, p. 226, ll. 15-21.** Parent was provided ample warning regarding her burden of proof in this matter. **p. 227, ll. 5-16; 8/4/09 p. 131, ll. 6-8, p. 143, ll. 7-10, p. 226, ll. 15-21.**

PRE-HEARING, HEARING AND POST-HEARING EVIDENTIARY RULINGS

A. Prior Order Not Relevant to this Proceeding.

15. In her complaint, Parent sought to raise claims based on a previously vacated Order in a 2006 due process proceeding between Parent and the Orange Southwest Supervisory Union. The District, in its *Response to the Complaint, Statement of Written Defenses*, and post hearing *Response to Motion to Reconsider*, maintained its position that the vacated prior Order is a nullity; is not relevant to this proceeding; nor binding on this school district.

16. **Motion to Exclude.** This Hearing Officer initially granted the District's *Motion to Exclude* filed on 7/20/09 during a phone conference on 7/21/09. Parent filed a *Motion to Reconsider* on August 16, 2009.

17. **Motion for Reconsideration.** This Hearing Officer denied Parent's *Motion to Reconsider* on August 31, 2009, finding that the prior vacated due process Order was nullified by the U.S. District Court and was neither binding on the Windsor Northwest Supervisory Union nor binding as precedent on this Hearing Officer. Parent was informed on at least three occasions: in a phone conference, at the pre-hearing conference and again at hearing, that she was allowed to submit evidence of facts underlying the prior due process. 7/21/09, pp. 4-5; 8/4/09, p. 212, ll. 7-9.

B. CSP Process and Document Not Relevant and Not Raised in the Complaint or Detailed Written Statement.

18. Parent first indicated her intent to offer as evidence a draft Coordinated Service Plan ('CSP') in her five day submission. On a phone conference on July 23,

2009, this Hearing Officer ruled that the CSP process was separate from special education due process proceedings and the CSP itself was not proper evidence in this proceeding on the issues raised. Parent was informed that she would be able to take testimony from witnesses regarding relevant aspects of the discussions held at the CSP meeting.

19. At hearing, Parent again attempted to introduce the CSP. **7/31/09, pp. 491-492; p. 492, II. 20-23.** Parent was granted the opportunity to elicit testimony regarding the services student received; the CSP was ruled inadmissible. **7/31/09, pp. 494-497.**

20. On August 16, 2009, Parent filed a *Motion to Reconsider* the exclusion of the CSP. The District filed a *Response to Motion to Reconsider*, and this Hearing Officer ruled on August 31, 2009, denying Parent's request for reconsideration and finding that the CSP is not relevant proof of denial of FAPE. The Hearing Officer reaffirms his decision that the CSP is inadmissible in this matter.

C. The summer programs of 2008 and 2009 Were not Placed in Issue by the Parent's Complaint.

21. Parent, in her initial *Complaint* and subsequent *Detailed Written Findings* expressly raised issues concerning summer 2007 IEP and services. She did not, however, allege any deficiencies, concerns or allegations regarding the summer programs of 2008 or 2009. **7/30/09, p. 64, II. 18-25; p. 73, line 18.** Issues which are not raised in either the *Complaint* or *Detailed Written Statement* are precluded from being raised in the due process hearing absent agreement of the opposing party. **VDE Rule 2365.1.6.2(e).** The Hearing Officer confirmed that Parent would be permitted to

take testimony from her witnesses regarding the 2008-2009 school year in general.
7/30/09, p. 123, ll. 21-25.

D. Preliminary positive ruling on Rule 52(c) Motion.

22. The District made a Motion for Summary Judgment on Partial Findings on August 4, 2009 at the conclusion of parent's case. 8/4/09, pp. 100-102. The Hearing Officer initially withheld rulings on the District's motion. p. 105, ll 16-21. Parent then introduced Maureen Nevers as a witness. p. 109. At the end of Ms. Nevers' testimony, the hearing officer indicated that he was inclined to grant the District's Motion for Judgment on Partial Findings. pp. 227-229. On August 5, 2009, the parties held a telephone conference in which the District renewed its Motion for Judgment on Partial Findings. 8/5/09 pp. 2-4. The Hearing Officer reiterated his inclination to grant the Motion. Id., ll. 10-16.

E. Only Parent's Case Considered on 52(c) Motion.

23. Due to the extended amount of time allotted to Parent's case, two District witnesses testified out of order. The first, Marie Kittel, by prior agreement of the parties, testified on 7/30/09 after 5:00 P.M. due to scheduling issues. 7/30/09, p. 242. Wendy Wells testified on 7/31/09 by agreement of the parties, because the unexpected extension of the Parent's case otherwise resulted in her unavailability. 7/31/09, p. 614. Prior to putting these witnesses on, the District reserved on the record its right to have Parent's case stand on its own merits. 7/30/09, pp. 242-244; 7/31/09, p. 615, ll. 12-16. Parent indicated that she did

not have any concern with the District's request. The Hearing Officer recognized and acknowledged that the District was not waiving its rights. p. 615, ll. 7-24.

FINDINGS OF FACT

ISSUE 1

SUBSTANTIAL COMPLIANCE WITH TERMS OF THE IEP

1. Parent did not offer either the 2007-08 or the 2008-09 IEP into evidence. She did not submit records or testimony to show that there was any material lapse in implementation of the IEP. Parent cannot be found to have sustained her burden of proof, or to have prevailed, on this issue.

ISSUE 2

DENIAL OF PROCEDURAL FAPE

A. The District Afforded Parents a Meaningful Opportunity to Participate.

2. **Parent's Assertion of Lack Of Opportunity.** Parent's chief procedural complaint is that she feels that she was denied adequate participation in J's program – a potential ground for denial of "procedural FAPE." [REDACTED], 7-31-09, p. 677, ll. 20-22¹. The evidence presented, however, shows that the Parents, and J's mother in particular, were afforded substantial and meaningful opportunities to participate.

3. Parent's Assertion of Inadequate Opportunity Not Credible.

¹ References to testimony transcript are by last name of witness, followed by the date of testimony, page and line(s).

Parent did not introduce the 2007-08 or 2008-09 IEP into evidence, nor did she introduce meeting minutes or other documentary evidence reflecting any lack of opportunity to participate in IEP meetings. She was silent as to any specifics about IEP meetings or her participation in them. Given this lack of facts to support her assertions, I find her claim of inadequate opportunity not credible in light of the findings below.

4. Participation in Meetings: Spring and Summer, 2007. J was to begin attending Bethel in fall, 2007. As early as May 18, 2007, when J's transition to Bethel from RUHS was just getting under way², Parent refers in an e-mail to "every meeting" she has attended with Deb Matthews and Susan Botha, signaling that there had already been multiple meetings. **H.O. Ex. 9 SD487).**

Al Vecchione also testified to a "series of meetings" in spring 2007. **7-31-09, p. 533, ll. 7-12.**

5. Participation in Meetings: Summer of 2007.

a. This is confirmed by SLP Maureen Nevers, who describes multiple IEP meetings with Parent(s) and WHS in the spring of 2007, **Nevers, 8-4-09, p. 151, ll. 4-5; p. 174, ll. 15-19; p. 175, ll. 1-10; p. 217, ll. 9-12**, and who attended some 22 hours of meetings with Parent and WHS staff over the summer of 2007, preparing for J's transition to WHS and program at WHS. **Nevers, 8-4-09, p. 151, ll. 2-5.**

² Parent testified that J's family's residence was not established as Bethel (rather than Randolph) until May 11, 2007. **-30-09, p. 270, ll. 10-23.** She also testified to monthly meetings in the spring. **-30-09, p. 270, ll. 12-18.**

b. Minutes of July 19, 2007 Meeting. The only meeting minutes submitted into evidence by Parent for that period time, for an IEP meeting on July 19, 2007, include an agreed upon "to do" list of activities for Susan Botha, WHS principal West, and J's mother, in preparing for J's transition to WHS. This reflects parental participation at the meeting, and participation in carrying out agreed upon activities. **H.O. Ex. 18 (PCA-C).**

6. Participation in Meetings: School Year 2007-08.

a. At hearing, Parent at no time described the development of the 2007-08 IEP, or her role in it. She did not introduce the IEP, nor did she testify about it.

b. Witness Nevers testified that the new draft for the 2007-08 IEP was emerging in September 2007, and that she (Ms. Nevers) had input into it. See, FN 16 below. **Nevers, 8-4-09, p. 218, ll. 14-18.** On questioning by Parent, behaviorist Al Vecchione testified that the agendas for the IEP meetings were "drawn up between you [J's mother] and Susan [Botha]." **Vecchione, 7-31-09, p. 595, ll. 4-7.** Vecchione, because he had a good relationship with J's Mother, was asked by the District to try to facilitate IEP meetings during the 2007-08 school year, and to meet with the Parent before the meetings to help her clarify what she wanted. **Vecchione, p. 588, ll. 16-25, p. 589, line 7.** I find, based on Vecchione's testimony, that there were multiple IEP meetings during that year, that Parent attended them, and that the District wished to make them more productive, and to support and improve Parent's participation in them.

c. Andy West's Participation in Meetings in 2007-08. Principal West began attending J's IEP meetings in the fall of 2007. **7-30-09, p. 347, line 2.** He was involved in "as many of the meetings as I could attend" for J. **p. 348, line 12.** He recalled that the IEP team was frustrated with J's mother at meetings in September, October and November of 2007. **p. 350, line 7- p. 351, line 3.** This testimony reflects multiple meetings from the start of school in 2007 in which the Parents participated.

d. No exclusion from Willard Meeting. The only specific instance of alleged exclusion of Parent from a meeting is Parent's claim, referencing the Katie Willard report, that WHS did not invite her to a "meeting" in December 2007. **[REDACTED], 8-4-09, p. 88, line 25 - p. 89, line 5; H.O. Ex. 34 (Willard report).** December 5, 2007 was the date of J's evaluation by Willard, not a meeting. Willard's report states that she visited WHS that date to evaluate J; observed J in classes and his afternoon swim time; engaged with him two times during the day in evaluative activities; and spoke with staff about his program. **H.O. Ex. 34.** There is no evidence of any meeting on that date from which Parent could have been excluded. Notably, however, minutes of the 2-28-08 IEP team meeting, at which Willard presented and discussed her report, reflect that J's mother attended and participated³. **H.O. Ex. 45 (C367-368).** Willard also later

³ I note that at this one meeting, the District also invited Parents to attend a training in use of J's new software, with Phyl Macomber, and Deb Matthews offered to explain to the Mother how J's curriculum was chosen. Consultant Macomber discussed scaffolding with the entire Team. SLP Christi Koch planned a meeting with Mother on March 6. A meeting was also arranged for the Mother, Al Vecchione and Principal West. **H.O. Ex. 45.**

interviewed J's mother, and that parental input became a part of her report. **H.O. Ex. 35(C174-187)**. I find that the Parent was not excluded from meeting with SLP Willard.

7. Participation in Meetings: School Year 2008-09. Training materials developed by Susan Botha to help Parents understand J's program include a summary of the development of J's 2008-09 IEP, and state that the IEP development occurred through 8 meetings, in which "each section of the IEP" was developed the same way: (a) proposals for the section of the IEP were sent out the week before; (b) pre-meetings were held with the mother "to clear up any questions about the proposals;" (c) full IEP team meetings then occurred allowing input from the entire team for revisions. **H.O. Ex. 47 at SD463**. SLP Christi Koch's report also references the 8 meetings used to prepare the 2008-09 IEP. **H.O. Ex. 37 at C18**. On this unrefuted evidence I find that the District met its duty to ensure meaningful opportunities for parental participation in IEP development.

8. Evidence of Ongoing Efforts to Provide Meaningful Involvement of the Parent.

a. Despite Parental assertions that she was not allowed effective participation, [REDACTED], 7-31-09, p. 659, ll. 5-6; p. 677, ll. 9-15; p. 677, ll. 20-22; 8-4-09, p. 68, the preponderance of the evidence reflects many significant ways in which Parent's input and requests were invited and responded to positively by the District. Some examples are described below.

b. **Lotus Lake Camp (LLC).** At the urging of the Parents, the

District paid for J's summer programs at Lotus Lake Camp (LLC) for summers 2007, 2008 and 2009. **H.O. Ex. 47 at SD463.** At the Parent's request, the District also agreed to pay Krystal Trask (who had long been an employee of the Parent under the "waiver") to provide 1:1 support to J for the summer programs. **Nevers, 8-4-09, p. 149, ll. 10-13; Trask, 7-30-09, p. 31, ll. 1-19; p. 95, line 15; p. 96, line 11; p. 97, ll. 5-11 (paid by Bethel summer 2007).**

c. Blue Monk Six. Also at the Parent's suggestion, as a part of J's transition to WHS in the fall of 2007, WHS staff met with musician and artist Barry Miller, who had been working with J on the Blue Monk Six project, a music sculpture installation. WHS staff provided a site at WHS for the installation of the project, as a way of introducing J to the school community. **West, 7-30-09, p. 429, ll. 13-20; p. 430, ll. 6-8; Miller, 7-30-09, p. 12, ll. 18-20; p. 153, ll. 13-20.** Principal West's testimony reflects the school's positive response to this request, including Mr. West and J exchanging letters on the subject, West getting in touch with Barry Miller, and West giving J and Mr. Miller a tour of WHS to choose an appropriate site to display the sculpture. West says he had several conversations with J's mother and Barry [Miller] regarding Blue Monk Six.⁴ **Id., p. 345, ll. 1-8.**

⁴ West noted that Blue Monk Six was "well received" by the WHS students, and that WHS students were impressed by its construction and design. He felt that Blue Monk Six

"showed [J] in a very positive way as far as what [J] had to offer," and noted that a Blue Monk Six PowerPoint was posted on the WHS website in the winter of 2008. Three WHS classes "toured" Blue Monk Six and J demonstrated various components of the sculpture. **p. 345, line 20 - p. 346, line 20.** This illustrates WHS's willing adoption of a parental suggestion, and meaningful follow up that resulted in a favorable introduction of J to WHS students.

d. Support of Parents' Request for Junk Band. Although there was no evidence of any duty to do so, Principal West helped the Parents with their request that J's old school, RUHS, allow J to take part in the RUHS "junk band." West phoned, e-mailed and wrote a formal letter in support of the Parents' request, but was ultimately told by RUHS that they did not take non-RUHS students. **H.O. Ex. 24(SD792-793)(E-mails between West and RUHS) (SD 0792-0793); 438, line 9 - p. 439, line 12.** J's father thanked West for his efforts by letter dated February 27, 2008. **p. 440, ll. 1- p. 441, line 11.**

The Parent's Complaint specifically raised access to the Junk Band as an issue. I find that the District took appropriate and helpful steps to assist the Parents, despite the absence of any evidence of a duty to provide such assistance to access another school's extracurricular activities.

e. RUHS Team "Transfer." Parent attempted to prove that the District wrongfully failed to carry over J's entire IEP team from RUHS⁵ as the IEP team at WHS. **Vecchione, 7-31-09, p. 533, line 7 - p. 535, line 18.** The evidence, however, proves that the District did retain and continue to pay the full RUHS staff/team until the end of the 2006-07 school year, and then carried over two key members of the RUHS IEP team: Maureen Nevers (J's SLP from January 2007-June 2007 at RUHS) and behaviorist Al Vecchione. **[REDACTED], 7-30-09, p. 270, line 10- p. 271, line 5; Testimony of Vecchione and Nevers.**

There is no procedural requirement that IEP team members in one district

⁵ Both Mr. Vecchione and Ms. Nevers, in turn, testified to doubts about the RUHS Team's ability to provide supports for J.

continue as team members when a student moves to another district. However, given the consensus of team members that J's most significant issues as he came from RUHS to WHS were communication and behavior, I find that the District's willingness to contract with outside specialists Ms. Nevers(SLP) and Mr. Vecchione (behavior specialist) for the WHS team illustrate its desire to respond positively to parental input and to act in J's best interest.

f. Notes to Parents (Home-School Journal). In 2008-09, the District communicated daily with the Parent in "Notes to Parents" in an effort to keep the parents in the loop. **H.O. Ex. 47, SD43.** Examples of these notes are included in **H.O. Ex.s 42 and 46.** The notes included a brief description of J's day; ideas on what works/doesn't work, strategies for areas of difficulty, questions for home and notices/information from school. The latter topic includes information about changes in J's usual schedule, such as doctor's appointments, substitutes if staff are sick; and preparations for a trip away from school. The Notes in **H.O. Ex. 42** report that writing and asking who, what, where, why questions is a successful strategy at school for redirecting J when he is off task⁶ (**11/13/08 notes**); report that the strategy of reminding J what grade he is in is successful when he is engaging in a behavior that is not appropriate, because he is motivated to be like a high school kid (**1/22/09 notes**); share with J's mother his discussion about rules at home (**Id.**); and urge her to help to prepare J for a field trip by asking why questions and giving examples (**3-26-09 notes**).

⁶ This strategy was also described and approved by Al Vecchione in his report of

H.O. Ex. 46 contains several additional examples which further reflect the District's routine of informing Parents daily of issues arising on a given day (for example, J repeatedly touching his groin area, and interventions used to fade that activity, **1-27-09 notes**; sending home a task analysis for J's visit to RTCC, for Parent to review with J, **2-9-09**).

In the **3-12-09 Notes**, in response to a communication from Parent, the school explained the purpose of the "Notes to Parents": "As far as communication between parents and school, we write these communications to you so that you will know what is going on with [J]. The purpose is to help you at home open up lines of communication with [J]." **H.O. Ex. 46, 3-12-09 notes**. Such communication undercuts the Parent's assertions in her own testimony that the District did not provide information for common use of language at home and school.

g. Continuation of Swim Program, 2007-08. At Parents' request (with support from Al Vecchione and Stanley Greenspan), the District agreed to continue to provide a time-consuming, offsite swim program to J during the school days of the 2007-08 school year. While the District felt strongly that J's time in the mainstream at school should be expanded, parents insisted that the swim program be kept for J's first year at WHS. **H.O. Ex. 26 (Greenspan April 2008 report re: swimming for self-regulation); West, 7-30-09, p. 360, line 19 - p. 361, line 19 (desire to expand academic classes for J in 2007-08); Mulley, 7-21-09, p. 89, line 18- p. 90, line 20⁷; Mulley rpt. H.O. Ex. 6, p. 12; H.O. Ex. 28 at 79-80 (Vecchione's recommendation); H.O Ex. 37, C13-C14 (Koch description of increased involvement in mainstream in 2008-09).**

h. Use of Greenspan Recommendations. Parent complains that the District did not follow all of Dr. Greenspan's recommendations. She spoke strongly of her trust in him. **[REDACTED], p. 258, line 22- p. 259, line 6.** Parent repeatedly stressed recommendations of weekly meetings, support across settings, and coordination of home and school goals.

Of the three service providers called as witnesses by Parent, Al Vecchione

⁷ Mulley admitted that the District provided J's swimming program during the school day in his first year at WHS at the Parent's request, and that she (Mulley) and the District had to convince the Parent that for 2008-09, J would benefit from a full day at WHS, which would allow more time in the mainstream. **Id.**

testified that Dr. Greenspan's reports were considered by J's IEP team in developing school services for J, **p. 562, ll. 17-21**, and Maureen Nevers also incorporated Greenspan's reports into her work with J. **Nevers, 8-4-09, p. 212, ll. 14-18.**

A number of the recommendations in Dr. Greenspan's most recent letter, **H.O. Ex. 26**, have been incorporated in whole or in part in J's program at WHS: "provide nurturing interactions so J has a chance to talk and interact with peers and teachers" (see, testimony of Al Vecchione); "help J pursue his interests in music" (**see, FOF ¶21**); "parents and teachers should compare notes about what works and doesn't work, and work on same social goals" (see, **H.O. Exs. 42 and 45**, examples of school's daily "Notes to Home," and **H.O. Ex. 47** training materials for home); "provide swimming for self-regulation" (**FOF ¶8f**; swimming continued into 2008-09, as after school activity -**H.O. Ex. 47**); "continue with a speech and language pathologist" (Nevers; Koch). Though weekly meetings may not be held at all times, Brandon Campo testified that he attended 10-12 meetings with Parent and others between his arrival in March 2009 and the end of school in June, **Campo, 7-31-09, p. 519, ll. 2-5**; there is ample evidence of many meetings with the Parent.

9. Parental Standard for "Adequate" Participation Based on Preference, Not FAPE.

"Parent-Driven" Programming. Parent, Krystal Trask and Linda Mulley testified to aspects of Parent's standard for adequate parental participation. Kristi Lenart summarized it most succinctly when she said that the key to approaching

J's program is that "the approach needs to be, first of all, family driven", that "his family is driving that train." **Lenart, 7-30-09, p. 211, ll. 9-13.** Parent's first three witnesses on day one of hearing were Krystal Trask, Kristi Lenart and Barry Miller⁸.

Trask and Lenart have been working for Parent with J since he was very young. **Lenart, 7-30-90 p. 189, line 20; Trask, 7-30-09, p. 96, ll. 6-11.** Their views of appropriate teaming for J reflect that experience: they appear to be accustomed to Parent controlling decisions and their work. Examples of "appropriate" teaming of which they approve date back to teams that planned J's toilet training and first grade evaluation. **Lenart, 7-30-09, p. 190, ll. 20-25; Trask, 8-30-09, p. 9, ll. 13-15; p. 103, line 1 - p. 104, line 4; [REDACTED], p. 265, line 5- p. 266, line 7; L. Mulley, 7-21-09, p. 11, ll. 2-7.**

While various teams for very young children may be family based and driven, that model is not a legal requirement for IEP teams for school age (here, high school) age students. **Compare, Nevers, 8-4-09, p. 131, line 3 - p. 132, line 22; p. 185, line 16 - p. 187, line 20 (describing Nevers' view of the home-school-community relationship, and difficulties she experienced with the parent).**

Witness Lenart admits that her views about teaming are based on experiences when J was very young and on her conversations with J's Mother. **p.**

⁸ That Lenart, Trask and Miller were all involved chiefly as the Parent's employees under the waiver creates an expectation of parental control – not applicable to the IEP team of a high school student. **Miller, p.142, ll. 5-13; Trask, p. 95, line 15 - p. 96, line 11; Lenart, 7-30-09, p. 182, ll. 2-10.**

219, II. 18 - p. 220, line 8. I find that Trask, Lenart and Miller each have very little or no experience, and no expertise, in IEP team operations or requirements. None participated in J's IEP teams at RUHS or at WHS. None is a special educator. Trask is a COTA, and Lenart is a "post adoption specialist." **7-30-09, p. 188, II. 6-8.** Miller is a musician.

c. The Parent's View of Her Role. Parent's wish for her role is reflected in an e-mail from her to Susan Botha dated April 7, 2009. **H.O. Ex. 41 (PC59A).** In it, she berates Ms. Botha for not including her (the Mother) in daily and weekly staff sessions planning for J's lessons. Parent complained at hearing that she "is not included in 'J's' SLP therapy at school." **[REDACTED], p. 678, II. 8-10.** She also testified that she wanted to be able to meet weekly⁹ with a team consisting of J's SLP, his special education case manager, his behaviorist, and an educational consultant¹⁰, and that she felt that was necessary for the District to meet its

⁹ Parent provides no evidence that either IEP called for such meetings. Parent says Al Vecchione recommended such meetings, but he did not testify to that; he testified to the effect that despite his efforts to facilitate meetings, they are largely unproductive due to Parent's failure to cooperate in moving through the agenda.

¹⁰ The Parent's desire has been to have WHS employ Ms. Mulley as a consultant. **H.O. Ex. 9; H.O. Ex. 45 at C367; H.O. Ex. 41, p. 2 (last sentence).**

educational responsibilities to J. [REDACTED], p. 78, ll. 1- p. 79, line 3. Christi Koch's report reflects that Parent sought to tell District staff not to use certain teaching methodologies. **H.O. Ex. 37 at C18.** I find that the type and level of participation Parent seeks is not required for the provision of procedural FAPE.

10. Mother Not a Collaborative Team Member.

a. The preponderance of the evidence shows that Parent actively participated in meetings, to a point where little could be accomplished. Evidence from witnesses Mulley, Nevers, Vecchione, West and Campo support this finding. **See, ¶10b-10f below.**

b. **Nevers: Parent Participation at Meetings.** SLP Nevers explained communication difficulties with J's mother and the resulting lack of progress at meetings. **8-4-09, p. 124, ll. 4-24; p. 173, line 15 - p. 179, line 20¹¹.** Ms. Nevers testified convincingly¹² to Parent's effect on the IEP team process and discussions, using as an example meetings at RUHS in the spring of 2007, when the IEP team was attempting to create an agreed upon form of schedule for J. This resulted in many meetings, many changes, more changes to the changes at the Parents' behest, and still no schedule was completed. Ms. Nevers

¹¹ Ms. Nevers stated convincingly, however, that she has worked for 16 or 17 years in the speech and language field with a wide range of special educators and special education administrators, and that she found special education administrator Deb Matthews and special educator/case manager Susan Botha to be "respectful, appropriate, approachable, willing" at all times in dealings with J's parents. **8-4-09, p. 179, line 21 - p. 180, line 19.** She reports that Ms. Matthews was always seeking ways of getting information to J's mother, and "folding her in" to the process, and that the child's needs were always her focus. **p. 180, line 20 - p. 181, line 9.**

¹² I find credible both Ms. Nevers' description of the problem and her testimony that she and the districts nonetheless continued to try to improve communications. See, FN 12, below.

comments that this type of parental involvement resulted in “immobilization,” to a point where the professionals had to choose between getting J’s programs and materials in place, or having everything pre-approved by the Parents. **Nevers, 8-4-09, p. 173, line 15 - p. 175, line 19.** Nevers points out that this attempt at parental control could be detrimental to J and his program, since the Parents did not always know what J needed, and the professionals working with J needed to be allowed the opportunity for input as well. **Id., p. 176, line 17 - p. 177, line 7.**

c. Mulley E-mails Report Parent’s Shortcomings as a Team

Member. In a contemporaneous e-mail from Linda Mulley to J’s WHS case manager, Susan Botha, Mulley wrote of a September 2007 meeting involving (at least) Botha, Deb Matthews, J’s Mother and Ms. Mulley: “I’m not sure we accomplished anything of what you wanted but frankly, even with reminders, cautions and promises to be quiet and observe/listen, [REDACTED] is often unable to calm down enough to get a task done and it’s very difficult to refocus her once she’s agitated or aroused.” **HO Ex.7 (SD1436-37)**

This acknowledgment by Parent’s own expert witness of Parent’s inability or unwillingness to listen and remain focused is strong evidence of the Mother’s difficulties in participating productively as a team member.

An earlier e-mail from Mulley to J’s Mother in July, 2007, appears to gently communicate to J’s Mother that her (the Mother’s) Team participation cannot be pervasive: “There is way too much work for [J’s IEP] team to do for everyone to be involved in every aspect of it. The large team can’t do everything.” Mulley urges

the Mother to consider being a member of a subgroup with a specific task, and notes that other groups (of which mother is not a part) should be assigned/carry out other necessary tasks. **H.O. Ex. 8 (SD1440-41).**

d. Principal West's Experience of Meetings. Principal West began attending J's IEP meetings in the fall of 2007. **West, 7-30-09, p. 347, line 2.** He was involved in "as many of the meetings as I could attend" for J. **p. 348, line 12.** He recalled that the IEP team was frustrated with J's mother in meetings in September, October and November of 2007. **p. 350, line 7 - p. 351, line 3,** and that meetings "were sometimes contentious" and not as "productive" as West would have liked. West said that the Team was frustrated due to this lack of productivity. **West, p. 351, ll. 10-16.**

e. Al Vecchione's View of Meetings. Dr. Vecchione said that, during the 2007-8 school year, he observed J's Mother being confrontational with individuals on the IEP team, and was asked by Deb Matthews to facilitate the IEP meetings, because the meetings were "really challenging to get anywhere" **7-31-09, p. 589, ll. 1-2.** The District asked him to assist J's mother to "really set goals for those meetings and know what she [mom] wanted when she went in [to the meetings]¹³," in hopes of accomplishing more, but that despite this additional

¹³ The District's reaction to the challenges that the Parent's style brought to the team was to ask Dr. Vecchione, as someone with whom the Parent had a good relationship, to help her to decide "what she wanted when she went in" to a meeting, and help her to set those goals by providing her with "extra help" before the meetings. This evidence illustrates the District's efforts to include the Parent meaningfully. Moreover, the evidence shows that the District does not allow the Parent's style to adversely affect J's programming. Witness Vecchione expressed his opinion that "whatever heat comes out of that [IEP] meeting does not affect how the Whitcomb people treat, treat her son [J]." **7-31-09, p. 589, ll. 21-23.**

intervention, the Team continued to get hardly anywhere on its agendas. **p. 586, line 18 - p. 589, line 21.** See, **Campo, 7-31-09, p. 486, ll. 8-22; p. 487, ll. 1-13; p. 519, line 25; p. 520, line 1.**

f. Lack of Collaboration by the Parent. Parental lack of collaboration was not limited to activities at IEP meetings. SLP Koch's report describes the District's adoption of language used by the family to address J's issues with "taking care of his nose," with success. **H.O. Ex. 37 at C18.** But, when the school communicated its effective use of green and yellow cards to reinforce refraining from "private behaviors," including cleaning his nose, Parent's response was not to inquire about how to use this successful reinforcer with J at home. **H.O. Ex. 46, 4-6-09 notes to Parents.** Instead, she undermined its use, and sought to stop it. J came in with a document from home that said not to use the colored cards anymore. During questions and answers with J, J explained **██████** said no more colored cards." **H.O. Ex. 37 at C17-18.** The District was using the colored card system to help J to learn what others might be thinking about what he was saying or doing - to help him learn expected social behaviors. This was a methodology that had been recommended by SLP Katie Willard, as part of J's being a "social detective," and was a key part of helping J to see his behaviors as others see them and begin to think about how others might interpret his behaviors. **H.O. Ex. 37 at 18; H.O. Ex. 47 at SD480.** Perspective taking (theory of mind) and social referencing (using social information to decide how to act in relation to the setting) were among key areas identified by the Willard report

to help J improve social communication. **H.O. Ex. 34 at C183.** I find this demonstrates both the District's attempts to involve the Parent in a common methodology and language, and Parent's lack of willingness to engage at the expense of parental control.

11. The Three Legged Stool. Parent's case frequently invoked the desirability of coordinating services across settings, and Linda Mulley described a model that she referred to as a "3 legged stool" – community, school, and home. **Mulley, 7-21-09, p. 27, line 25 - p. 28, line 9; H.O. Ex. 4 (P's Ex.4)¹⁴.**

There appears to be consensus that a student with special needs (and probably all students) should receive supports from home, in the community and at school, and that ideally, the providers of these supports would collaborate. **Campo, 7-31-09, p. 484, ll. 16-23; Nevers, 8-4-09, p. 131, line 3 - p. 132, line 22; Vecchione, 7-31-09, p. 554, ll. 7-10; p. 555, ll. 8-14.** There is no evidence, however, that if this ideal can not be achieved, or can only be achieved in part, a student cannot receive meaningful benefit from his education.

c. District Provided J Opportunities for Community Involvement. The preponderance of the evidence shows that the District did its part to include home and community aspects in its school planning for J. For example, J's 2008-09 program includes school-supported activities in the community for: swimming (WHS provided 1:1 both years); organ practice in the community; and

¹⁴ No evidence was submitted to indicate that Exhibit 4 was ever provided to the District before this due process. **Mulley, p. 31, line 24 - p. 32, line 3.**

extracurricular activities including concerts and community and All-State parades and Hoops Band. **H.O. Exhibit 47, SD 465; H.O. Ex. 6 at p. 11; West, 7-31-09, p. 405, line 1 - p. 405, line 24.** Parent introduced evidence of J's successful participation in a community musical/dramatic production in which he sang and played instruments. **[REDACTED], 7-30-9, p. 271, line 20 - p. 272, line 17; Miller, 7-30-09, p. 168, line 20 - p.169, line 8; p. 173, ll. 1-16; p. 174, ll. 1-15.** This testimony describes the very type of joint effort across the school and community, and home/waiver (Barry Miller, the parent's employee, also worked on the production), that Parent claims was lacking. The musical director of the show was Susan Rule, whom Parent describes as " a great lady, who is a drum teacher and music teacher down at Whitcomb."

d. District Made Efforts to Inform and Involve Home: the Parent/Waiver Staff. The preponderance of the evidence shows that the District made many efforts to inform and involve Parent. For example, in summer 2007, when planning **[REDACTED]** transition to WHS, the District prepared and provided J's Transition Book, **H.O. Ex. 56**, for J to use to support his transition to WHS. **Nevers, 9-4-09, p. 197, line 21- p. 188, line 25.** Nevers also provided transition instructional materials to the WHS Team (including the Parents) to support the transition from RUHS to WHS. **H.O. Ex. 54 (SD1349-1392); Nevers, 8-4-09 pp. 155-158.** As previously found, the District communicated daily to the Parent in writing via "Notes to Home" during the 2008-09 school year. **[REDACTED], 8-5-09 at 34; Ex.s 42, 46. (Samples from "Notes from home" communication book.)**

FOF ¶¶8f.

e. Many meetings were held with Parents attending and participating during J's two years at WHS. **See, FOF ¶¶4-10, above.**

f. Training Materials for Home and Waiver Staff re: J's Program.

Susan Botha created training materials describing J's program and key interventions for use at home. **H.O. Ex. 47, especially at SD470-471, SD473-474, SD481 and H.O. Ex. 47, SD482a (a CD with recorded materials imbedded).** The materials were given to Parent at a meeting in the spring of 2009, and were reviewed with Parent at a subsequent meeting. **[REDACTED], 8-4-09, p. 71, line 25 - p. 72, line 8; p. 95, ll. 19-21.** These materials describe and explain in detail the important aspects of J's program, including aspects of his program based on the TEACCH model (SD463-464) to organize his personal work space at school and his schedules and folder system; his use of Assistive Technology (SD 464-465), including Classroom Suite and Comic Strip Creator on his ThinkPad, videos, a PDA and Flip camera, and scaffolding to learn sequenced steps of activities. Also outlined are methodologies used by the school in teaching J social cognition and communication skills, **H.O. Ex. 47 at SD464**, and behavior regulation. **Id., SD465.** After school activities supported by the school are also listed. **Id.** Printed PowerPoint slides are included to provide further explanation of these areas. **Id., SD466-484.** Page SD484 summarizes specific training opportunities for the home and home staff, including the organizational systems for J (SD469-471); use of Classroom Suite (addressed in video); the use of "wh"

questions (SD481); materials for home/PCS training in social detective work and social communication (SD472-4), and the use of green and yellow cards (SD482; also addressed in video).

g. Parent admitted that she has never watched the video. [REDACTED], 8-4-09, p. 72, II. 9-10. The video walks the viewer through J's space, use of Classroom Suite and other aspects of his program. The viewer can proceed at his/her own pace, and return for further viewing. The materials provide a detailed overview and explanation of J's programs and the materials, assistive technology and methods used in J's program.

h. **Finding: Adequate Efforts to Inform and Include the Parent.** I find that the District provided appropriate programs to J, and made appropriate efforts to include the Parent and to keep Parent in the communication loop.

ISSUE 3

THE STUDENT WAS PROVIDED A SUBSTANTIVE FAPE.

A. The Student Was Provided Substantive FAPE in 2007-08 and 2008-09.

12. While Parent challenges whether J received educational benefit under his IEPs at WHS, she failed to submit either IEP into evidence¹⁵, and failed to put on a single witness who testified to any material lack in the program provided to J

¹⁵ The only evidence on a related claim by Parent -- that there was no IEP in effect at the start of the 2007-08 school year -- is to the contrary. SLP Maureen Nevers states that there was an IEP in place during the summer of 2007 and into the early fall: "As far as I was concerned, I had an active IEP, the one I'd used in the spring. And I used that until I left in September. And -- and at that point I had already seen the drafts for the new IEP, and had been part of that development. **Nevers, 8-4-09, p. 218, II. 14-18.**

by WHS. None of the witnesses provided testimony that challenged the appropriateness of J's IEP, or the sufficiency or success of the services provided. To the contrary, the witnesses who had substantive knowledge of J's program at WHS spoke in positive terms about J's benefit and progress there.

13. J's Chief Needs. Every witness called by the Parent, and she herself, identified J's chief challenges to be in communication and social pragmatics, and (in some instances) emotional regulation (behavior). **Mulley, p. 53, ll. 14-17; p. 82, line 10 - p.84, line 5; line 25; H.O. Ex. 4 (P's 4)(Mulley's thoughts on [J]); Trask, p. 16, ll. 20-22; Lenart, p. 190, ll. 11-17; West, 7-31-09, p. 414, ll. 1-18; Campo, p. 484, ll. 1-5; Vecchione, p. 575, line 20 - p. 576, line 18; [REDACTED], 7-30-09, p. 257, ll. 7-8; p. 258, ll. 1-6.** In addition, Linda Mulley's overview of J's needs identifies becoming as independent as possible at school as the "overarching goal" of J's program. **Mulley's H.O. Ex. 4 (P's 4).**

14. Benefit with Respect to J's Chief Needs.

a. J's Needs Were Addressed by the WHS Program. The preponderance of the evidence is that J made progress and received meaningful benefit in these major areas of need as a result of his program at WHS. Parent has not introduced J's IEPs. However, H.O. Ex. 47 describes J's WHS program in 2008-09, and the goals and materials described there demonstrate that the program focused on these areas: "social cognition," "communication," and "Behavior Regulation." **H.O. 47 at SD464-465; SD476.**

b. Progress with Respect to Independence. In the matter of

independence, Al Vecchione commented on the great strides J has made in independence while at WHS. **H.O. Ex. 25 at C75.** Ms. Mulley states in her report of observation of J at WHS at the end of the 2007-08 school year that “[J] has developed a nice repertoire of independent skills.” **H.O. Ex. 6 at p. 10 of the report, “Action 1.”** She describes these skills to include that “[J] transitions well and easily from his classes and activities. ...He was also able to find his classes independently and to function for long periods of time in the bathroom or shower area at the pool.” **H.O. Ex. 6, p. 10.** She also reports a number of independence skills that she observed J demonstrate during her observation, including independently accessing, memorizing and then following his daily schedule. **H.O. Ex. 6, p. 8, first full paragraph at top of page.**

c. Benefits: Emotional Regulation.

(i) Linda Mulley. As far as emotional regulation and behavior are concerned, Mulley reported¹⁶ that “most of the behaviors that were identified as challenging and problematic in Randolph have been resolved.” **H.O. Ex. 6, bottom of p. 8.** She recalls some of these behaviors as flipping light switches on and off; flushing toilets in the girls and boys bathrooms, and bolting. **Mulley 7-21-09, p. 82, ll. 15-25.**

(ii) Al Vecchione. Al Vecchione’s focus, as the developmental psychologist on J’s team, is on J’s social, emotional, and

¹⁶ Mulley says she wrote down what she saw. **Mulley p. 37, line 23 - p. 38, line 1.** Mulley states that her purpose was to report what she saw; not to evaluate the student’s program. **Mulley, 7-21-09, p. 96, ll. 23-25. Ms. Mulley’s report, H.O. Ex. 6 (C44-C52).**

behavioral development. In his opinion, J is appropriately supported at Bethel [Whitcomb] in these areas. **7-31-09, p. 575, line 20- p. 576, line 3.** Witness Vecchione says at WHS J experienced “meaningful growth developmentally, in terms of his communication, behavior difficulties, ability to understand his thoughts, feelings and perceptions, problem solving, coping, etc.” **p. 592, line 23- p. 593, line 3.** At the center of the WHS supports is the “wonderful relationships which are the foundation for self regulation” that J has with staff and peers at Whitcomb. **p. 576, ll. 5-7.** Dr. Vecchione was a member of J’s Randolph IEP team including 2006-07 for “a year or more.” **p.529, line 24 - p. 530, line 2.** J had been suspended for flushing toilets prior to Vecchione’s becoming a member of the Randolph IEP team. RUHS had a behavioral program in place, designed by Linda Mulley, that focused on J’s toilet flushing behaviors. In Dr. Vecchione’s professional opinion, the behavioral program designed by Linda Mulley at RUHS was “terrible.” **7-31-09, p. 571, line 20 - p. 572, line 7.**

d. Benefits: Communication. J’s paramount need, improved ability to communicate, is the skill area in which all knowledgeable witnesses describe substantial growth over the two years at WHS. I find that a preponderance of the evidence shows that J’s progress and benefit in communication skills while at WHS was meaningful and substantial.

(i) Al Vecchione. Vecchione’s November 1, 2007 report notes growth in the following areas: level of independence; degree of integration into the mainstream; J’s communication level, especially between Stephanie

Rhoades (J's 1:1 teacher) and J. **H.O. Ex. 22.** Vecchione's view of the strength and success of the services provided to J in the 2007-08 and 2008-09 school years is positive and specific. In his opinion, Vecchione testified, J is now "communicating much better than I've ever seen him communicate in the time that I have known him, and that passing real information back and forth about his perceptions, thought and behavior and feelings" is part of a "true developmental kind of approach." Dr. Vecchione opined that J did not have these communication skills or was not using them at Randolph "to lay the foundation for him [J] to understand his world and manage himself well." **Vecchione, 7-31-09, p. 576, ll. 7-18.** I find convincing Mr. Vecchione's opinion that J's improvement in communication was directly related to the supports that were put in place by Whitcomb. **Vecchione, p. 606, line 24 - p. 607, line 2; p. 607, ll. 15-16.**

(ii) Expansion of Types, Numbers of Communication

Partners. It is a "fundamental developmental concept that you start with one and you expand to many," and that is why J's "fabulous relationship and interactions with Stephanie Rhoades, his 1:1 teacher is so important. J is now able to expand the communication skills he has learned in communicating with her, to communications with others," and that "is exactly what [Dr. Vecchione] has observed with him in the school." **Vecchione, 7-31-09, p. 576, line 19 - p. 577, line 21.** Vecchione has observed J's expanding ability to communicate with a number of special education staff, and eventually, with classroom teachers. **p. 577, line 22 - p. 578, line 14.** Vecchione also describes as "fabulous" J's current

communication with his (regular education) gym teacher, because the teacher is able to talk to J like any other member of the class, and J to respond. **p. 578, ll. 5-14.**

(iii) Dr. Vecchione explained a "written dialogue" included in one of his reports to the WHS IEP team, that he had with J on September 23, 2008. **Vecchione, p. 582, line 13 - p. 585, line 12; H.O. Ex. 29 (SD1448-1451); 7-30-09, p. 258, line 22- p. 259, line 6.** Vecchione found that the communication reflected in the exchange was "a great improvement, certainly in our ability to communicate about important things..." **Id., p. 585, line 13 - p. 586, line 7.**

(iv) Communication: Testimony of Brandon Campo.

Witness Campo testified that even in the months (since March 2009) that he has been working as a counselor with J, J's social pragmatics have increased. Currently, when with Campo, J has been consistently using full sentences "with subjects and predicates." **7-31-09, p. 502, line 8- line 16.** In the two weeks prior to the hearing Campo observed that J had communicated "extremely well" with Campo, and with a member of the waiver staff, and J's 1:1 teacher (Stephanie Rhoades), **p. 503, ll. 13-18, p. 509, ll. 14-20,** and he has also observed J communicating with two regular LLC staff members ("horse staff"-further illustrating J's widening circle of people with whom he can communicate meaningfully). **p. 509, ll. 5-6.** Campo testified that he would define "communicates very well" as a questioner asking J direct questions and J responding " in an appropriate manner with complete sentences and a sentence

structure and then providing feedback to [the questioner].” p. 510, ll. 1-9.

15. A Preponderance of the Evidence Supports a Finding of Meaningful Educational Benefit.

a. **Linda Mulley and Vecchione on the Ultimate Question.** Linda Mulley opined that J had improved during his year at WHS, **Mulley p. 85, ll. 14-17**, but felt that she did not have a basis to provide an opinion one way or the other on meaningful educational benefit. **Mulley, 7-21-09, p. 112, line 19 - p. 113, line 1; ll. 19-20.** Dr. Vecchione, who unlike Mulley was closely familiar with J’s program in RUHS during 2006-07, and with J’s program at WHS for 2007-08 and 2008-09, said it was his opinion that J has received a meaningful educational benefit during his two years at Whitcomb High School. **9-31-09, p. 590, ll. 1-4; ll. 9-21.**

b. **Credibility of Mulley and Vecchione.** During the three year period of the 2006-2009 school years, Dr. Vecchione had ongoing contact with J, J’s mother, and J’s IEP teams, and was providing direct service to J. Linda Mulley did not. Of all the witnesses called by the mother, Dr. Vecchione alone had the combination of specialized knowledge, direct instructional relationship, and exposure over time to J, J’s teams and J’s programs, to back up such an opinion.

B. Summer of 2007 Services Provided J Educational Benefit.

16. The preponderance of the evidence shows that J received appropriate services and meaningful educational benefit in the summer of 2007.

17. The record is clear that the District did provide summer services to J. It paid for J to attend Lotus Lake Camp (LLC) during the summer of 2007. Parent

asked for LLC as the summer program, telling J's Team that LLC had long been "a very successful experience for him, and the highlight of the year." **M. Nevers, 8-4-09, p. 149, II. 7-13.** The District also paid for J's long-time home support person, Krystal Trask, to be J's 1:1 during this experience. Trask had performed this role since summer 2002. **Trask, 7-30-09, p. 97, II. 5-11; 07-30-09 p. 9, II. 24-25; p. 10, III. 5-9; 19-21.** Parent advocated for Trask to be so employed by the District on grounds that consistency was important to J's success. The District acceded to Parent's request. **Trask, 7-20-09, p. 31, line 10-19 - p. 32, line 2.** In addition, the District paid Maureen Nevers for 24 hours of service over the summer, to include direct service, observation and meeting attendance. Maureen Nevers says that J had his communication binder with him as a support for camp, and explained its use at LLC. **p. 213, II. 5-15.**

18. Trask: Summer Program Benefited J.

a. Krystal Trask stated that J's participation in the arts, music and drama program at LLC in 2007 was the best ever, and that J was most successful at LLC the summer of 2007. **Trask, 8-30-09, p. 101, II. 23-25.** Trask, a certified occupational therapist assistant (COTA) who has worked for J's Mother for about 10 years as a 1:1 support for J, in particular as he attended camp. says that she has seen "much growth [in J] in the camp environment." She says J works best in "a predictable environment" with good supports, like LLC. LLC is a good environment for J because it is very structured and predictable, with the same schedule unchanged over the years. **Trask, 7-30-09, p. 16, line 2 - p. 17, line 13.**

This has allowed J to be successful there.

b. Trask said she received no SLP support from the District during the summer of 2007. **Tr. 7-30-09, p. 64, ll. 6-7**, but she testified to J's great success at LLC in 2007. Trask admitted that she never told case manager Susan Botha, special education director Deb Matthews, or J's mother that she would have liked more SLP support. **p. 98, ll. 9-24**. Her comparison to the RUHS support provided the prior year is not convincing. Trask testified that it consisted of "20 minutes" of training from an SLP (Jessie Graham) prior to the beginning of the summer program, going over the first page of a document prepared by Graham. That page of the document conveys little substance. **H.O. Ex. 12 (PB24.1)(first page of document only)**. **Trask, 7-30-09, p. 60, ll. 10-13**. I find that the level of "training" described by Ms. Trask prior to the 2006 summer program is not of substantive significance¹⁷.

¹⁷ For the same reason, Trask's report of the summer of 2007, prepared at the Mother's request, at some point in 2008, well after the camp was over, does not carry great weight. **Trask, 7-30-09, p. 22, ll. 1-5; p. 96, ll. 12 - p. 97, line 4**. Trask only provided a copy to the Mother. **Id., p. 96, ll. 3-4, H.O. Ex. 10 (PC 65.1)**.

c. There is No Evidence that J Needed More Summer 2007 SLP

Support. SLP Maureen Nevers' testimony confirms that Krystal Trask never asked her for help, **Nevers, 8-05-09, p. 215, ll. 17–25**, and Nevers further noted that J's mother would not let her speak with Trask. **8-4-09, p. 214, ll. 12-14**. She also noted that LLC was a "familiar place with familiar partners" and that J had his communication binder with him, and she never heard that these supports were insufficient for him. **Nevers, 8-5-09, p. 213, line 5 - p. 214, line 6**. I find that there is no showing that the lack of direct SLP services, or lack of summer IEP in the summer of 2007, resulted in any material loss of benefit to J¹⁸.

d. SLP Support was provided for the summer 2007, but the Parent Blocked Timely Access to J. J's IEP team had planned that SLP Nevers would provide 24 hours of service to J and his Team over the summer of 2007, with times to be agreed on by the Parent. **8-4-09, p. 18, line 7- p. 129, line 24**. Nevers had hoped to use the majority of this time to observe J across environments and to provide direct service to him and prepare materials for him. **p. 149, line 16, p. 150, line 8 - p. 151, line 1**. Parent effectively blocked Nevers from observing J at camp on several occasions by failure to respond to timely requests for scheduling of dates, and by insisting that Ms. Nevers meet with her (the Parent) instead. As a result, 22 of the 24 hours of time Ms. Nevers devoted

¹⁸ Since the Parent failed to introduce the IEP into evidence, there is no frame of reference to see what the IEP called for by way of ESY. Nonetheless, the unrefuted testimony is that the District provided J's summer camp experience, his 1:1 aide, and up to 24 hours of SLP service time for the summer of 2007, and that J received the benefit of all those services and that he had a successful experience at LLC that summer.

to the Student's case over the summer of 2007 was spent in meetings with the Team and Parent, rather than in observing and/or working with the Student.

Nevers, 8-4-09, p. 129, ll. 15-14; p. 150, line 9 - p. 151, line 9. Nevers' testimony, which I found credible, is corroborated by H.O. Ex.s 52 and 53¹⁹.

C. Appropriate and Adequate Planning for the Transition to WHS Occurred in the Spring and Summer, 2007.

19. The evidence shows appropriate and successful planning for J's transition from RUHS to WHS.

a. Parent alleged that there was inadequate planning for J's transition to WHS. The evidence shows that the District did plan for this transition and that the planning was successful. Ms. Nevers spent 22 hours over the summer at meetings with Parents and others and working on materials for the transition. She and the District prepared Exhibit 56 (SD299-334), entitled "[J's] Transition Book," for J to use during his transition. **H.O. Ex. 56 (SD299-334). M. Nevers, 8-4-09, p. 155, line 14- p. 157, line 12.** This exhibit reflects that Susan Botha and Principal West were actively involved in the transition process. Ms. Nevers also prepared materials documenting instructional programs and supports from his RUHS placement, so services could be carried over to WHS as a

¹⁹ These reflect that Nevers contacted the Parent twice trying to set up times to see J at LLC. On the first attempt, J's Mother wanted to meet with Nevers before Nevers visited the camp. **H.O. Ex. 52.** On July 5, 2007, in response to a second request from Nevers, Parent again insisted that Nevers first talk with her. **H.O. Ex. 53.**

“seamless move.” **H.O. Ex. 54 (SD1349-SD1394)**. The materials were prepared for use by the adults in the Team, and some were for use by J himself during transition. **Nevers, 8-4-09, p. 158, ll. 2-20; p. 159, line 16 - p. 160, line 6; p. 162, ll. 5-20.**

b. The one set of minutes from summer 2007 meetings introduced by the Parent, **H.O. Ex. 18**, provides an example of some of that planning, which appears comprehensive. Progress on some transition activities already underway is reported, and then an action plan is prepared, with tasks “assigned” to the Parent, Maureen Nevers, and Susan Botha²⁰. A “Things to Do List” is agreed to, and tasks to bring the Blue Monk Six Project to WHS are outlined.

c. The Parent introduced no evidence to support her assertion that this transition planning over the summer of 2007 was inadequate. Ms. Nevers testified that her observation of the District’s involvement at this time was that it was Student-centered. She was told by Deb Matthews, the special education director, that the school wanted to do whatever it took to support the Student’s transition to and program at WHS. **Nevers, p. 179, line 21- p. 180, line 11; p. 180, line 20- p. 181, line 19. See, FN 10 above.**

20. Success is Best Evidence of Good Planning. Ms. Nevers opined that the best evidence of how well a transition from one school and district to

²⁰ One of the two tasks assigned to J’s Mother is to “follow up with the Vecchiones to discover if the are coming to any more meetings.” **Id.** At hearing, the Parent suggested that the District dropped the ball on follow up with the Vecchiones in the summer.

another is planned and carried out is the student's reaction. **Nevers, pp. 160, line 21-162, line 20.** Within two months of the transition, Al Vecchione issued his November 1, 2009 report, describing J's successful transition into WHS. **H.O. Ex. 28.**

D. The District Provided Appropriate Access to Music-Based Learning Opportunities.

21. Parent testified that WHS did too little to provide J opportunities to participate in music – an area of strength for J. She introduced evidence of successful participation in a community musical/dramatic production in which J sang and played instruments, to prove that the school should have done more. **[REDACTED], 7-30-9, p. 271, line 20 - p. 272, line 17; Miller, 7-30-09, p. 168, line 20 - p. 169, line 8; p. 173, ll. 1-16; p. 174, ll. 1-15.** However, the evidence is that J participated all the music offerings at WHS, and some additional ones. **West, 7-31-09, p. 431, line 13 - p. 432, line 23.** These included the WHS band; private music lessons from the music teacher (which Linda Mulley observed, and opined were “well designed and excellent”); school-supported after school activities – which included organ practice; and extracurricular activities including HOOPS Band, concerts, and community and All-State parades. **H.O. Ex. 47, SD 465; H.O. Ex. 6 at p. 11; West, 7-31-09, p. 405, line 1 - p.405, line 24. See, FOF ¶11c above.**

22. Evidence Does not Support Parent's Complaints Regarding AAC for J.

a. The Parent testified that she feels J needs to “augment his

communication.” He needs “something that he can be independent with.”

“Whether it’s high tech, low tech, it’s up to the professionals.” [REDACTED], 8-4-09, p. 57, ll. 3-14. She wants a device that J can use “across settings.” The professional, Maureen Nevers, who knew J well as his SLP, and is certified by RESNA (the entity that certifies assistive technology practitioners) states that thus far low tech supports have worked well for J. Nevers, 8-4-09, p. 163, ll. 13-15; p. 147, line 23 - p. 165, line 3; p. 165, ll. 23-25. She testified that the ChatPC that Deb Matthews ordered to try in the summer of 2007 was not something she would have recommended in the normal course. p. 119, ll. 13-15. At the time Nevers was working with J at WHS, he only used the scheduling function, and everything was on his paper schedule as well. J did not seem very interested in using the ChatPC at the time. p. 122, ll. 7-10. She found no dramatic difference in J’s use of the PDA over the paper supports that he was using. p. 165, ll. 13-15.

b. The evidence shows that J functioned well at school with his low tech system; J was able to independently prepare himself for his classes, take the appropriate folder from his work space, and use his Classroom Suite and computer to support himself in class. H.O. Ex. 37, C15 (Koch Rpt.) See also, H.O. Ex. 6, Mulley report. The District provided Parent with lengthy training materials, describing the use of these low tech but effective systems. Ex. 47 at SD470-471. J is also learning to use his PDA. SLP Christi Koch says that a PDA was recommended by SLP Jessie Graham. Ex. 37, 16. Koch characterizes the PDA as a home-school communication device. She reports that he inputs daily

activities, changes, things of interest to then take home to share with his Parent.

Id. She says that currently there is no need for J to have this type of device to help with executive functioning or monitoring his daily schedule at school. **Id.**, at **C16**. The training materials in **H.O. Ex. 47** also address and list the more high tech assistive technology devices J uses, including the PDA. **Id.**, at **SD476**.

c. The daily Notes to Home (**H.O. Ex.s 42 and 46**) also provided information about J's work with his PDA, and in one of the samples, the staff encourages the Mother to use verbal prompts to have J use the PDA with her to share information from school. **H.O. Ex. 46 (3-12-2009)**

d. I find that the evidence supports a finding that J's program incorporated a variety of high and low tech assistive technology devices, which together with the rest of his program allowed him to receive meaningful benefit.

IV.

FAPE WAS PROVIDED IN THE LEAST RESTRICTIVE ENVIRONMENT APPROPRIATE FOR THE STUDENT

A. J Was More Meaningfully Integrated at WHS Than at RUHS.

23. The Complaint asserted that J spent too much time out of the mainstream in 2007-08²¹. Parent failed to submit any evidence on the issue of least restrictive environment, and submitted no evidence that J is spending more time in non-mainstream settings than is appropriate. The preponderance of the

²¹ The July 19, 2007 minutes reflect that, at the time, "██████ felt J only needs to attend two [regular] classes at most per day." It appears she contemplated that one would be gym. **H.O. Ex. 18, pp. 1-2.**

evidence reflects meaningful and increasing participation in the mainstream and community. I find that the District is providing J with FAPE in the least restrictive environment.

24. Al Vecchione and Maureen Nevers strongly state that while J had been extremely isolated from the mainstream at RUHS, at WHS he was integrated with his peers. Nevers describes J's program at RUHS as "limited, as to academic rigor and opportunities for interaction with peers." **Nevers, 8-4-09, p. 148, ll. 3-5.** She says that at RUHS (where she provided SLP services to him from January 2007- June 2007) he was segregated for all intents and purposes. She says:

"He was—he had a one to one aide and they – that was a physical barrier for a lot of interactions because here's this big guy next to this high school kid, and so wherever they went, there was that barrier. His individual work space was a windowless room at the back of the library. He was involved in, you know, the – basically electives, you know, music, art, lunch, those kind of – PE. And when he was in those classes, for instance, PE, he wasn't doing what everyone else was doing, you know. He would walk around the gym with everybody else, and then they would do an activity and he's done. ... So there was no real effort to have him be part of a bigger class. He would participate in some of the choral-type things. I didn't see him in band, but I did see him in like, chorus, that type of thing, where he was sort of part of the bigger group but yet him sitting with his aide, you know, in the last row in the corner. Same thing in art. It really was a different feel to it than, you know, the intention of being part of a group."

p. 148, line 6 - p. 149, line 6. Al Vecchione provides a similar description of J's RUHS program. **Vecchione, p. 572, line 8 - p. 573, line 12.**

25. Witness and evaluator descriptions of J's functioning at WHS are in sharp contrast. Social language evaluator Katie Willard observed J in mainstream

classes and in the community at the swimming pool. **H.O. Ex. 34 (c174-185; H.O. Ex. 35 (C186-187).** Willard saw him participate with peers in a gym class on a day the usual PE teacher was absent. She observed J and the other students, at the direction of a central office staffer, go to the locker room to change, and then independently break into two floor hockey teams. Willard reports that even under these unexpected circumstances, "J appeared to be participating and interacting with the other students without any obviously noticeable differences." **H.O. 34 at C175.** Willard also describes J's appropriate and meaningful participation in a mainstream music class. **Id., at C177.**

26. Linda Mulley observed J at WHS twice at the end of the 2007-08 year. She observed him in a PE class, and in a mainstream science class where J "worked alongside his peers using Classroom Suite as an accommodation support." He was "working in the same curriculum area but at a different level from his peers," and "[h]e was engaged with the lesson and needed very little assistance as he moved through the Suite lessons." **H.O. Ex. 6, p. 11.** In her summary of her observation, Mulley stated "The instruction I observed (physical education, music, science class) was effective and appropriate for J. There remain few behavioral issues and those that do occur for the most part concern social appropriateness." **H.O. Ex. 6, p. 13.** Her overall impression was that J is benefiting from the efforts of his school team to include him whenever possible in mainstream activities and classes," and noted that it "was very good to see J in proximity to and comfortable with other students and interacting with some of them in structures activities and classes." **H.O. Ex. 6, p. 9.** Mulley saw some of

J's drawings hung in the corridor of the school and saw him in the cafeteria.

Mulley, p. 81, ll. 10-25.

27. J's SLP from October, 2007 through June 2009, Christi Koch, in March, 2009, described the advantages of J's 2008-09 schedule, because swimming was provided as an after school activity, so J spent the full day at school, thereby increasing his time in the mainstream. **H.O. Ex. 27, at C13-14.**

See, FOF ¶8g, FN 7; ¶8h(iii) above. Koch describes his success in the regular classroom. In three of his classes (PE, art and music), the need for 1:1 assistance has been reduced or faded altogether. **Id., C15.** She notes that there are many staff and peers who interact positively with J, and that there are a number of peers who interact naturally with J to support his development of pro-social behaviors. **Id., C15.**

28. Al Vecchione, who also observed J at both RUHS and WHS, states that "[c]ompared to last year, [J] is much more independent, takes the bus on his own, goes to the locker room alone, and has free run of the halls and classrooms." In fall of 2007, he also observes that "[J] is much more integrated than he was last year. Both students and staff at WHS know him by name and interact with him regularly through the course of the day. Whitcomb has created a welcoming community for J." **H.O. Ex. 28 (C75-80), at C75.**

29. Brian Campo, who started working with J in March of 2009, says he observed J engaged in "reciprocated conversations" with peers in art and gym class. **p. 504, ll. 6-9.** Campo observed that gym class was a "great setting" for J

due to its small size and the interactions between J and his peers. In Campo's opinion, the students in the class communicated well with J and did not alienate him in any manner. Campo testified that his observations of J in art class were the same as the gym class. **Id., line 23.** Campo's observations of J's "informal" interactions in the lunchroom and halls was similar. **Campo, 8-31-09, p. 504, line 13 - p. 505, line 11.** Campo noted that J also communicates well with "Janet at the front desk [of the WHS office]." **p. 508, ll. 15-16.**

30. In 2008-09, J was taking a variety of regular classes. Al Vecchione's written dialogue with J at the start of 2008, J states that he likes: Chorus, Band, PE, Art, Botany (all regular education) and thinks that Vermont history (a regular education class) is hard. **H.O. Ex. 29 at SD1449-1450.** J's 2008-09 program, described in Exhibit 47 includes both substantial mainstream time in school and substantial opportunities for community and co-curricular activities. **Ex. 47 at SD465.**

31. Parent introduced no evidence that J was spending more time out of the mainstream environment than necessary.²²

V.

FINDINGS OF FACT (CREDIBILITY)

32. In gauging witness credibility, I find three major considerations. First is

²² The sole exception-- J's 2007-08 lengthy "away time" during school hours in order to engage in his swimming program - has been addressed above. This arrangement was permitted for J's first year, but, at the school's urging, in his second year at WHS, swim time was moved to after school, allowing fuller participation in the mainstream. **See, FOF ¶8(g) and FN 7, above.**

the witness's knowledge base, professional background and experience in general, and their knowledge and experience of J in particular. I consider the witness's knowledge, or lack thereof, of J's WHS program, and his participation in it; the witness's participation in team meetings for J at WHS; knowledge of J's IEP, IEP services and/or the IEP process; experience in teaching/educational service delivery for J; opportunities to observe J in the WHS environment over time; opportunities to interact with J in school settings; and knowledge of J's work and experiences at WHS. Second, is the witness's demeanor at hearing; did the witness sound and look convincing? Third, does the witness's testimony seem objective or does it appear that the testimony is informed by a bias for one party or the other?

33. a. Applying these factors, I find that the testimony of Al Vecchione and Maureen Nevers is highly credible. Both are professionals with backgrounds in autism and their respective fields (behavior and speech and language, respectively). Each has a knowledge base allowing him/her to compare the RUHS and WHS programming.

b. Dr. Vecchione has worked directly with J and his high school teams -first at RUHS, and then at WHS. He has a good relationship with J's mother. He also testified to the superiority of the WHS program compared to that of RUHS.

c. Ms. Nevers' testimony was also compelling. She is not currently working for or being paid by either party. She provided direct SLP service to J at RUHS, and was deeply involved in planning J's transition to WHS with the IEP

team. She evaluated him as school started in the fall of 2007, providing his IEP team a baseline from which to work. **H.O. Ex. 55.** She had many opportunities to work with J's mother on teams at RUHS and (over the summer and into September of 2007) at WHS.

d. Nevers' testimony concerning attempts to communicate and participate in teams with J's mother, and the frustration she and others experienced in such attempts, is believable.

e. Nevers' professional licensure as an SLP-CCC, and background/experience in providing both direct and consultation services gives her a solid basis on which to compare WHS personnel and program with other situations, and her credentials from RESNA render her testimony about assistive devices credible. She provided direct instruction to J from January 2007, on, and participated in both his RUHS and WHS teams, and worked very closely with WHS staff in setting up J's program there.

f. Those portions of the testimony of Principal West in which he was asked questions within his sphere of knowledge, were also credible. Although an employee of the District, his testimony sounded frank and even-handed.

34. Applying the same factors to witnesses Lenart, Trask, and Miller, I find they share weaknesses as witnesses. All of them had little or no knowledge of J's IEP, of its implementation, of J's participation and program at WHS, or of his IEP team and its meetings. None has any formal training as an educator or in autism. None was an IEP team member, or regularly attended WHS IEP meetings. None had observed J in his program at WHS. None had any knowledge of J's program

at WHS for the 2008-09 school year. Lenart, Trask and to a lesser extent Miller, are all paid by J's mother to provide the services she asks them to, and (except for Miller²³) have been employees of the Parents for 10 or more years. I find that their testimony reflected her point of view.

35. I find that Linda Mulley has a weak basis for her expert testimony. She has a background in education and autism but has never provided direct instruction to J. **p. 71, ll. 23-24.** There is no evidence that she ever evaluated J. She has never worked with the family to organize a space for J at home. **p. 71, l. 25 - p. 72, l. 9.** She has little or no knowledge of J's transition from RUHS to WHS. **p. 72, ll. 14-19.** She was not seeing J at time of his transition from RUHS to WHS and was not on J's team. **p. 72, ll. 21-23.** She did not see the transition materials and planning for the move to WHS. **p. 72, l. 24- p. 73, l. 6.** During the period September 07-present (July 09) Mulley has not provided any services to J or his family. **p. 3, ll. 7-15²⁴.**

²³ Miller has worked with J for the Parents for five years. **7-30-09, p. 139, ll. 12-16.** He works under the waiver that is administered by the Parent, who is his supervisor. **Id., p. 141, line 24 - p. 142, line 20; p. 182, ll. 3-10.**

²⁴ The apparent exception is that she apparently worked with her associate, Chris Knippenberg, to create Exhibit P5 (HO5). She admits, however, that the plan contained in that document was not implemented during the summer of 2008, and that she did not disclose it to the District until the fall of 2008.

36. She did observe J on two occasions at the end of the 2007-08 school year. 7-21-09, p. 73, l.23- p. 74, line 7; ll. 20-22; p. 79, ll. 2-4. She had not reviewed program materials being used by case manager Susan Botha, SLP Christi Koch or special educator Stephanie Rhoades at the time she observed J. p. 88, line 21- p. 89, line 1. Her observations were not as long as her observations usually would be; she was "squeezing them in" to her schedule. **Mulley, p. 89, ll. 7-17.** She says she observed 1 1/2 hours one day; 4 hours the other day, but the first observation included the trip with J to the swimming pool, and the second included brainstorming time with Al Vecchione and Susan Botha. **Mulley p. 89, ll. 13-14; ll. 18-24.** On neither occasion did Mulley observe J working 1:1 with either his special educator (Stephanie Rhoades) or his SLP (Christi Koch), and she has no recollection of having seen him working with his special educator/case manager, Susan Botha. **Mulley p. 37, ll. 6-8; p. 82, line 18 - p. 93, line 8.** As of the date of her testimony, she had not seen either of J's WHS IEPs. After her June 2008 observations, Mulley had no further involvement with respect to J and WHS. **Mulley p.42, ll. 7-11²⁵.**

37. At many times during her testimony, Mulley commented on her lack of memory of the events in which she had participated, and her testimony sounded tentative as a result. Mulley has no knowledge of J's 2008-09 school year whatsoever.

Mulley's involvement, if any, in planning for J over the years appears to have been largely unofficial and sporadic. Her recollection of the events about which she

²⁵ Mulley testified that she thought she might have observed the Student in September 2008. She was not sure, and did not testify to any facts relating to such possible observation. **Id.**

testified was, as she mentioned a number of times, not strong. Mulley had no knowledge about what planning was done in the vocational area for J for 2008-09. **Mulley, p. 93, line 23 - p. 94, line 7.** She at no time reviewed any planning documents with respect to J's program at WHS. **Mulley p. 94, ll. 8-25.** She says that, while she feel she was providing good recommendations in her report, she did not know whether these practices were or were not already in play at the time she made them.

For all of the above reasons, I find that the testimony of Linda Mulley is not entitled to much weight.

CONCLUSIONS OF LAW

I.

RELIEF OF THE TYPE PROVIDED FOR BY FEDERAL AND STATE RULE OF CIVIL PROCEDURE 52(c) IS AVAILABLE IN DUE PROCESS HEARINGS

A. Content of Federal and State Rules.

1. V.R.C.P. 52(c)²⁶ and F.R.C.P. 52(c) both allow a trial court to dispose of unsupported claims while protecting a litigant's ability to try their best case and present their best evidence.²⁷ The litigant must be "fully heard" on the issue(s), but the right to

²⁶**V.R.C.P. 52(c) Judgment on Partial Findings:**

" If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render judgment until the close of all evidence. Such a judgment shall be supported by findings of fact and conclusions of law as provided in subdivision (a) of this rule, whether or not requested by a party."

²⁷ V.R.C.P. 52(c) and F.R.C.P. 52(c) are worded identically.

be “fully heard” does not amount to a right to introduce every shred of evidence that a party wishes, without regard to the probative value of that evidence.”²⁸

2. A Rule 52(c) motion may be made at the end of the complaining party’s case, but opportunity is not limited to the close of the party’s evidence, since the request for judgment may be limited to some, but not all, claims. The trier of fact retains the discretion to “enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence.”²⁹ The judgment must be supported by findings of fact pursuant to Rule 52(a). Here, the District moved for a Rule 52(c)-type disposition of the entire case at the close of the Parent’s evidence. **8/4/09 pp. 100-102.**

3. At hearing the District, by agreement of the parties, presented two witnesses prior to the conclusion of Parent’s case, due to scheduling complications resulting from Parent not having completed her case by 5 p.m. on Thursday, July 30 as scheduled. Procedural FOF ¶21. Prior to putting the witnesses on, the District specifically moved to preserve its right to have Parent’s case judged on its own merits (without consideration of evidence introduced by/through the District’s witnesses). The Hearing Officer agreed that the District retained this right. **7/31/09, p. 615, ll. 2-25.**

²⁸*First Virginia Banks, Inc. v. BP Exploration & Oil, Inc.*, 206 F.3d 404, 407 (4th Cir. 2000).

²⁹*First Virginia Banks* at 407, citing F.R.C.P. 52 advisory committee’s note (1991 Amendment).

4. a. At the close of Parent's case, the Hearing Officer indicated an inclination to enter such a judgment, in favor of the District, for the reasons set out in the hearing transcript, and subject to submission by the parties of Proposed Findings of Fact/Conclusions of Law, and to the Hearing Officer making findings of fact and conclusions of law. 8/4/09 pp. 226-230; 8/5/09 pp. 2-6. In doing so, the Hearing Officer considered solely the evidence presented in Parent's case in determining whether she had met her burden of proof.

b. On August 5, 2009, the parties participated in a phone conference, at which time the District renewed its Motion for Judgment on Partial Findings. 8/5/09, p. 2-4. The Hearing Officer confirmed his inclination to grant the Motion, subject to filing of Proposed Findings of Facts and Conclusions of Law from the parties, and issuance of Findings by the Hearing Officer. p. 2, ll. 10-16; pp. 6-8.

B. Applicability of the Rules to This Proceeding.

5. Although the Rules of Civil Procedure do not expressly apply to administrative due process proceedings, administrative officers and courts considering their actions have long looked to the Rules for procedural guidance. Notably, in J.D v. Pawlet, 224 F.3d 60 (2d Cir. 2000), the parents/appellants challenged the school district's and Hearing Officer's reliance upon the civil rules' summary judgment procedure and principles, arguing that summary judgment was not provided for in the special education statute or administrative regulations, and that entry of summary judgment against parents denied them their procedural entitlement to a due process hearing. 224 F.3d at

68-69. In Pawlet, summary judgment was entered by the Hearing Officer before hearing had commenced. The Second Circuit rejected the parents' arguments, concluding that:

[a]lthough the language of the statute regarding due process hearings is mandatory, the purpose of an adversarial hearing is to resolve disputed issues of fact. Issues of law reside where they always have – with the adjudicator, whether an administrative or judicial officer. Nothing in the legislative history of the IDEA suggests that Congress intended to require an evidentiary hearing when the material facts are already established by ample affidavits and documents. In those situations, an adversarial hearing would be duplicative and a waste of administrative resources. ...Thus, where the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact, the use of a summary judgment procedure is entirely proper.

224 F.3d at 68-69 (underscoring added).

6. The same procedural logic applies here, where the Parent, as complaining party, has had a full opportunity to present her case, and the evidence submitted in her case not only fails to make out a prima facie case, but provides sufficient factual proof for the District to prevail on all the issues. The Hearing Officer therefore concludes that the application of a Rule 52(c) type procedure is appropriate here, given the lack of factual and legal substance of the Parent's case. See, Findings of Fact submitted herewith, and the Conclusions of Law below.

C. Upon Application of Rule 52(c) Standards, the District Prevails and the Parent Does Not Prevail on all Issues Before the Hearing Officer.

7. In contrast to Motions for Summary Judgment, which require the trier of fact to consider the evidence in the light most favorable to the non-moving party, on motions for judgment on partial findings, the trier of fact acts as “final fact finder” and “reviews all

the evidence presented without presumptions in favor of either party.”³⁰ A court [or other trier of fact] will grant the motion “ if, on the evidence presented, the judge would find against the party that has already presented evidence and in favor of the moving party.”³¹ Under Rule 52(c), the court must weigh the evidence to determine if the party has proven his/her case.³²

8. Here, Parent presented well over three days of testimony through nine witnesses, including herself. In an effort to assist her, the Hearing Officer provided her, as a pro se litigant, with wide latitude, including in excess of 3 days to present her case, when the law and pre-hearing orders and conferences had established one day without objection or request for additional time from Parent. See *VDE Rule 2365.1.6.4(b)(3)*. In addition, at hearing this Hearing Officer repeatedly cautioned and urged the Parent to use her time to present relevant testimony and exhibits. Parent had more than a fair opportunity to be “fully heard.” She did not meet her burden. See, Procedural History.

D. The Parent Has Not Met Her Burden of Proof and the Evidence Supports the District's Position on the Claims.

9. As the complaining party, Parent bears the burden of proving that WHS did not provide a substantive and/or procedural “free and appropriate public

³⁰*Machia v. Microsoft Corporation*, 335 F.Supp.2d 507, 510 (D. Vermont 2004).

³¹*Id.*, citing, *Regency Holdings (Cayman), Inc. v. The Microcap Fund, Inc.*, 216 B.R. 371, 374 (Bkrtcy. S.D.N.Y. 1998).

³²*Ortloff v. United States*, 335 F.3d 652 (7th Cir. 2003).

education" (FAPE) to J in 2007-08 and/or 2008-9³³. Her burden was to show that (1) substantively the IEPs and program provided to J by the District were not "reasonably calculated to enable the child to receive educational benefits," and/or that (2) procedurally, the District failed to comply adequately with IDEA procedures. Bd. of Ed. v. Rowley, 458 U.S. 176, 206-207 (1982). Accord, Mrs. B. v. Milford Bd. of Ed., 103 F.3d 1114, 1120 (2d Cir. 1997). The benefits must be more than trivial benefits. Rowley, 458 U.S. at 192; Walczak v. Florida Union Free School District, 142 F.3d 119, 130 (2d Cir. 1988). The Hearing Officer concludes, based on the evidence submitted during the Parent's case, that the District provided J both procedural and substantive FAPE during those years. See, conclusions of law below.

II.

THE DISTRICT PROVIDED THE STUDENT WITH SUBSTANTIVE FAPE.

A. J. Received Substantive FAPE and Meaningful Educational Benefit from his School Program.

10. The record is uncontroverted that J received "meaningful educational benefit" from his programs at WHS. J made significant gains in (among others) language, independence, peer interaction, and social integration with neurotypical peers. He learned to use a computer and the Classroom Suite software effectively in accessing his regular classes. He has succeeded in reducing obsessive and impeding behaviors which had become significant problems at his prior school (RUHS). The testimony of Al Vecchione, the only witness called by Parent who worked with J while at

³³ See, U.S. Supreme Court holding in Schaffer v. Weast, 126 S.Ct. (2008).

RUHS and for the full two years at WHS, was very positive in describing J's progress and his significant benefit in the areas which Parent and her expert Linda Mulley agreed were paramount: communication and social cognition; emotional/behavioral self regulation; and independence. Dr. Vecchione, who witnessed J's growth over the two year period at WHS, spoke convincingly about J's growing ability to communicate meaningfully, and the expanding groups of people – service providers, classroom teachers, peers and “Janet in the front office of WHS” with whom he felt comfortable communicating, and opined that J received meaningful educational benefit. **FOF ¶15a, and see FOF ¶¶12-21.**

11. Substantive FAPE: There is No Duty to Maximize Potential or Services.

Parent's complaints, and the remedies she seeks, are for “more”: more speech and language services; more assistive technology; more consultants; more meetings; more communications to and from the home; more time spent with the Parent; more so-called “wrap around” services in the form of training for the home; more technology. But Rowley holds that, while an IEP must be reasonably calculated to enable the child to receive educational benefits, the purpose of FAPE and “the intent of the Act *was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.*” 458 U.S. at 192 (emphasis added)³⁴. This “no duty to maximize” rule has been relied on ever since by federal

In fact, Rowley reversed the federal courts below, on grounds that they “erred when they held that the Act requires [the school district] to maximize the potential of each handicapped child,” 458 U.S. at 200, and held that, “[w]hatever Congress meant by an ‘appropriate’ education, it is clear that *it did not mean a potential-maximizing education.*” 458 U.S. at 197, N. 21 (emphasis added).

courts and other IDEA decision makers, including the Second Circuit. Grim v. Rhinebeck Central School District, 346 F.3d 377, 379 (2d Cir. 2003) (“IEPs are subject to numerous requirements but are not required to furnish every special service necessary to maximize each handicapped child’s potential, but a basic floor of opportunity, consisting of services that are individually designed to provide educational benefit to a child with a disability”)(citing Rowley; Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567; 1988-89 EHLR DEC. 441:429, 431 (2d. Cir. 1989) (“an IEP can be appropriate even if it does not provide “everything that might be thought desirable by ‘loving parents’”; Cerra v. Pawling Central School District, 427 F.3d 186, 194-195 (2d Cir. 2005) (to same effect), citing Rowley and Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3d Cir. 1995) (“School districts ‘need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a ‘basic floor of opportunity.’”).

12. So, the Parent must prove more than that J might benefit from additional, different, or even better services; she must prove that J has not benefited from the IEPs and programs provided to him. Id.; O’Toole v. Olathe Dists. Sch. Unified Sch. Dist., 144 F.3d 692, 708 (10th Cir. 1998) (“The school district is required by statute and regulations to provide an appropriate education, not the best possible education or the placement the parents prefer.”)(quoting Heather S. v. Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997)). This the Parent has not done.

13. Substantive FAPE: Sufficiency of Opportunities for Participation/ Support in Performing Arts and Music. The Parent’s Complaint and Detailed Written Statement (DWS) claimed that the District had not offered sufficient music and art

opportunities; that it should have done more. The overwhelming evidence is that WHS provides J with access to and support for a variety of musical endeavors. **FOF ¶21.** The District has no legal duty to maximize J's music or arts program or his potential with respect to music. See, "no-maximizing" cases cited above. The District has no duty to provide J with training to be a professional musician. Grim v. Rhinebeck Central School District, 346 F.3d 377, 379 (2d. Cir. 2003); Madison Metropolitan S.D., 37 IDELR 2696 (WI SEA 2002) (finding that music student did not require enrollment in a private performing arts program in order to receive adequate transition services).

14. Speech and Language Services are Adequate. The Parent's complaint seeks more speech and language services. The Parent did not submit evidence to support this claim. Her evidence, however, includes the report of J's SLP, Christi Koch, for the two years he has attended WHS, in which she opines that, in fact, J does not need more, but less direct SLP service. She believes that it would be counter-productive to J's growing communication skills to spend more time receiving direct SLP instruction, rather than having the 1:1 teacher, special educator and SLP work together to allow for much of the speech and language instruction to be provided in "natural settings." **H.O. Ex. 37 at C18-19.** The evidence supports a conclusion that the level of service that J has been receiving has been adequate, since he has made significant strides in communication, noted in Ms. Koch's report as well as in the testimony of Al Vecchione, Brandon Campo and Andy West. **FOF ¶¶13, 14a, 14d(i)-(iv).**

15. Substantive FAPE: A Parent's Preference Does Not Determine What is Appropriate for FAPE. The Parent's testimony clearly reflects that her personal

preference would be for different staff, services, methodologies, etc. The IDEA does not entitle Parents to write the IEP themselves. The IDEA neither contemplates nor mandates that parent preference should inform the child's IEP and program. See, Brougham v. Town of Yarmouth, 823 F.Supp. 9, 16 (D. ME 1993) ("It is clear that under the IDEA, parental preference alone cannot be the basis for compelling a school district to provide a certain educational plan" for an eligible child.); U.S.D.O.E. Ltr. to Burton, 17 EHLR 1182, 1183 (3-20-91) (placement of a child based solely on parental preference is inconsistent with the IDEA); U.S.D.O.E. Ltr. to Gramm, 213 EHLR 149, 150 (7-28-88) ("While actions of a public agency [under the IDEA] are subject to administrative due process and judicial review, a parent's demands are not determinative as to what a public agency must provide"); Plainfield-Old Bethpage Central School District, 509 EHLR 264, 275-66 (N.Y.R.O. 6-3-88).

16. The evidence is that, since spring of 2007, the District has met many times with the Parents and has considered and used their input in IEP development and programming. **FOF ¶¶2-11.** There is no requirement that the District adopt all parental requests. Nor does the IDEA contemplate that the Parent will engage in lesson planning and selection of educational methodologies. These are matters for the educational and other experts involved in the day to day teaching of the child.

G. There is No Legal Duty to Follow all of an Evaluator's Recommendations as Mandates.

17. The Parent made several allusions in testimony to the reports of Stanley Greenspan, which she also submitted into evidence, suggesting that the District failed to follow his recommendations or consider his reports. It appears that many of his

recommendations, are fully or partially in place in J's program. **FOF ¶¶8h.** The Parent did not introduce any evidence to show how the IEP team did or did not deal with the Greenspan input (or, in fact, whether or when it was provided to the Team). The law is, at any rate, that an IEP team is not required to adopt any or all of a consultant's recommendations. Renner v. Bd. of Ed., 185 F.3d 635, 644 (6th Cir. 1999) (lack of FAPE does not result where IEP team declines to consult, or adopt the recommendations of, the parent's expert); Washington South (VT) Supervisory Union, 20 IDELR 1073, 1075 (OCR 1993) (IEP team's duty was to consider, not adopt or implement, an independent evaluator's recommendations); Grim, 346 F.3d at 379; Nack v. Orange City School District, 454 F.3d 604, 614 (6th Cir. 2006) (fact that an IEP team chose not to adopt all of an expert's recommendations "hardly compels the conclusion that the IEP itself was lacking"); Hiller v. Bd. of Ed., 743 F. Supp. 958, 970, 973 (N.D.N.Y. 1990) (holding that the district is not required to "[a]ccept the recommendations of outside professionals or follow the preferences of the parents."). J's program is affording J meaningful benefit, and the Parent introduced no evidence to show that more meetings are necessary for J to continue to receive an appropriate program.

B. J's Programs at WHS Are in the Least Restrictive Environment Appropriate to His Needs.

18. Definition of Least Restrictive Environment (LRE). The IDEA "creates a presumption in favor of public school placement" allowing integration of students with and without disabilities. School Committee of Burlington v. Dept. of Ed. of Mass., 471 U.S. 359, 373 (1985) (construing the EAHCA, the predecessor of the IDEA). Slama v.

ISD No. 2590, 39 IDELR 3, at 1153 (D. Minn. 2003) (Integration of a child with a disability with other students is “a core goal of the IDEA”). Least restrictive environment is defined by the IDEA mandate that “[t]o the maximum extent appropriate, children with disabilities,..., are educated with children who are not disabled,... removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C §1412(a)(5) (emphasis added).

19. The Evidence Shows that J is in LRE. The Parent introduced no evidence to show that J spends too much time out of the mainstream environment, or that he is receiving too much specialized instruction in a 1:1 setting.³⁵ The evidence shows the contrary: the District has emphasized increasing J's opportunities in the mainstream environment. Those observing him at WHS have all commented on his growing success in the regular education environment, and with non-disabled peers, in sharp contrast to his program at RUHS as described by witnesses Vecchione and Nevers. **See, FOF ¶IV A and ¶¶23-30.**

³⁵ I note that the Parent's complaint in fact asks for more direct 1:1 instruction from a speech and language pathologist, which would require more time out of the mainstream. **H.O. Ex. 37, at C18-19.**

IV.

THE DISTRICT HAS PROVIDED STUDENT PROCEDURAL FAPE

A. Provision for Meaningful Parent Participation is an Element of Procedural FAPE.

20. The Parent says that the District did not allow her to participate meaningfully as a member in the IEP process. Meaningful parent participation is a key component of the procedural FAPE requirement under Rowley. Roland M., *supra*, 910 F.2d 983, 994. The Vermont special education rules, too, speak to parental rights with respect to IEP/Evaluation Plan development. VDE Rules 2362.2.2(b)(7), 2362.2.7(a), 2363.4(a)(6), and 2363.5. Neither source of law affords parents a right to pervasive control, unlimited meetings, or unlimited communications.

21. The law assures only that Parents have reasonable opportunities to participate in IEP development. The Second Circuit has ruled that “[i]n considering whether the District fulfilled IDEA’s procedural obligations, we focus on whether the [parents] had an adequate opportunity to participate in the development of [the] IEP,” and that where the parents were “significantly involved” in the development of the IEP, their procedural rights under the IDEA were “adequately protected.” Cerra v. Pawling Sch. Distr., 427 F.3d 186, 191-192 (2d Cir. 2005). See, Jonathan G. v. Caddo Parish School Bd., 875 F.Supp. 352, 368 (W.D.La. 1994) (Parental participation afforded by IDEA is sufficient where parent is afforded full opportunity to participate in development of IEP and placement decision); Klein (TX) Ind. Sch. Distr., 29 IDELR 670, 676 (Tx. SEA 1998) (“Ms. T. is an extremely devoted mother and zealous advocate for [student], and

has made very detailed demands concerning his education. However, ...IDEA ... does not entitle parents to prescribe all the details of their child's education.").

22. Where Parent Is a Difficult Team Member, Equity Precludes the Parent From Blaming Resulting Dysfunction on the District. Here, the Parent complains that the District's teams did not include her enough. Parents are, by law, members of their child's IEP Team. With Team membership comes with corresponding responsibilities. The evidence reflects a pattern of confrontation; difficulty in focusing and contributing to team productivity; and lack of response to outreach by the District, in such efforts as the "Notes for Home" and PowerPoint training materials (H.O. Ex. 47). **FOF ¶¶10, 11g, 18d.** The Parent cannot then complain of perceived lack of inclusion or opportunities. Cordrey v. Euckert, 917 F.2d 1460, 1466 (6th Cir. 1990) (parents must operate within Act's procedural framework; district's initial procedural misstep did not entitle parents to abort IEP process); School for the Arts and Learning v. Johnson, 2006 WL 1000337, *5 (D.D.C.) (unpublished opinion) (Parent, as necessary and primary member of IEP team, shares obligation to conduct annual IEP review; education of disabled child is not a game of "gotcha").

B. Providing for Parent Control of Program is Not Required by the IDEA.

23. The Parents Had Meaningful Opportunities for Participation. The Parent did not introduce either of J's WHS IEPs into evidence, nor did she submit any evidence concerning IEP development, or describing IEP meetings held to develop, or address issues arising under, either the 2007-08 IEP or the 2008-09 IEP. The unrefuted

evidence reflects that the Parents participated in many team meetings during the 2007-08 and 2008-09 school years, including those at which the 2007-08 and 2008-09 IEPs were developed. **FOF ¶¶ 2-7.** A clear description of the IEP development process for the 2008-09 IEP is set forth on page 463 of H.O. Exhibit 7, and indicates the IEP was developed at some 8 meetings (including pre-meetings with J's mother to answer any questions about aspects of the IEP). **Id.** The evidence also reflects many other ways the District invited and used Parent input, and the many ways the District attempted to involve the parent, and to provide needed information to her. **FOF ¶¶ 8a-h; 11a-h.**

24. The Parent Seeks More than the Meaningful Participation that the Law Provides. The Parent's case, however, powerfully states her desire, or mistaken assumption, that "appropriate parental participation," means a right to control or effectively have a right of pre-approval for all aspects of IEP content, as well as the staff, service delivery system, and educational methodology. **FOF ¶ 9a-c.**

C. The Law Does Not Require Weekly Meetings.

25. The Parent demands daily or weekly meetings, and believes that the District has a duty to provide that opportunity. **FOF ¶ 9c.** Federal law requires the IEP team to review "the child's IEP periodically, but not less than annually" to determine progress, and to revise it "as appropriate" to address any lack of progress, anticipated needs, and/or reevaluation results. 34 C.F.R. §300.343(c) (emphasis added). Federal regulations define an IEP as a "written statement for a child with a disability that is developed, reviewed and revised in a meeting" in accordance with other federal rules.

34 C.F.R. §300.340(a) (emphasis added). The U.S.D.O.E.'s use of the singular ("a meeting") reflects the standard set by regulation for "annual review." While the law also allows parties to request IEP meetings between annual reviews, for the purpose of amending the IEP, this is not carte blanche for demanding continuous IEP meetings. The Parent simply submitted no evidence to support her assertion that more meetings would be required and/or useful. (Testimony from Dr. Vecchione, Maureen Nevers and Andy West in fact suggested that meetings with the parent are frustrating because so little can be accomplished.) **FOF ¶10a-f**. At any rate, I have found that ample meeting opportunities were provided. **FOF ¶7**.

26. I conclude that procedural FAPE was not denied on this basis. See, further discussion immediately below.

D. There is No Parental Right To Select Staff.

27. The exhibits and testimony contain many references to the Parent's wish to have Linda Mulley hired by the District as a program educational autism consultant.

FOF ¶9c and FN 10.³⁶ She also complains that RUHS employees on J's former team were not moved from RUHS to WHS to serve on J's team. This is not her right. It is a

³⁶ Federal law also does not empower parents to decide who from among school staff and consultants will fill the specific mandatory roles on the IEP team. That is solely for the school district. According to U.S.D.O.E. Analysis on 34 C.F.R. §300.321(a):

...[I]t is important to emphasize that it is the LEA that determines the specific personnel to fill the roles for the LEA's required participants at the IEP team meeting. A parent does not have the legal right to require other members of the IEP team to attend an IEP Team meeting. Therefore, if a parent invites other LEA personnel who are not designated by the LEA to be on the IEP team, they are not required to attend.

Federal Register, Vol. 71 No. 156, at page 46674 (August 14, 2006) and at 46670 (LEA decides which particular teacher will be member of team)(emphasis added).

matter of black letter law that school districts have the sole discretion to assign staff. Slama v. ISD No. 2580, 259 F.Supp. 2d 880, 884-885; 39 IDELR 3, at 1152 (D. Minn. 2003) (noting that, although parental participation is important in the IEP process, “nothing [in Supreme Court] opinions suggests that parents usurp the District’s role in selecting its staff to carry out the IEP’s provisions.”); Bd. of Ed. v. Scotia-Glenville Central S.D., 23 IDELR 727 (SEA NY 1995) (services of any appropriately trained individual were sufficient); Moubry v. I.S.D. No. 696, 951 F. Supp. 867, 885 (D. Minn. 1996) (District may assign staff without parental consent); In re A.P., D.P. 00-44, at page 5 (A. Rome 2001) (“The mother, for whatever reasons, is not happy with [name omitted] as a para-professional. However, IDEA does not provide her with the authority or right to choose staff who will work with her child”).

28. Equally to the point, the Parent submitted no credible evidence that the current staff, which includes Susan Botha (special educator, case manager and autism specialist), a speech and language pathologist, two behaviorists (Campo and Vecchione), and a supportive principal, and a supportive Special education director (Deb Matthews) requires any additional oversight or assistance from an autism consultant. While it appears that the Parent and Ms. Mulley have a long standing relationship, the Parent has not shown that Ms. Mulley’s services (or the services of another person to fill the role of outside autism consultant) is necessary to provide J a FAPE. There is no evidence that J’s team is not adequate to provide J an appropriate special education program. As I have found above, J has been receiving FAPE, in 2007-08 and 2008-09 at WHS.

E. Parents Are Not Entitled to Determine or Select Educational Methodology.

29. To the extent that the Parent is arguing that a particular methodology for instruction, educational programming and/or service delivery of her preference should be imposed upon the District as an outcome of this case, Rowley rejected such assertions. 458 U.S. 176 , 207-08 (questions of methodology not for the courts to decide). See, Lachman v. Illinois State Bd. of Ed., 852 F.2d 290, 297 (8th Cir. 1988) (Rowley and its progeny leave no doubt that parents, “no matter how well-motivated,” do not have a right “to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.”); Grim v. Rhinebeck Central Sch. Dist., 346 F.3d 377, 383 (2d Cir. 2003) (reversing trial court, for choosing between “vying methodologies,” thereby “imposing [its] view of preferable methodology upon the States”).

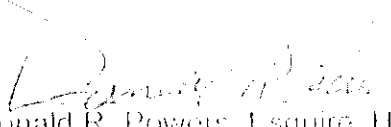
F. There was an IEP in Place in the Summer and September of 2007.

30. The Parent introduced no evidence to support the claim in her complaint that there was no IEP in place over the summer of 2007, and at the start of the 2007-08 school year. Maureen Nevers, on the other hand, testified that there was an IEP in place in the summer and into September, as the WHS team developed a new one to replace it. **FOF ¶12, FN 15.**

G. A Vacated Order Is a Nullity.

31. Despite my pre-hearing ruling at hearing the Parent continued to seek to introduce the Hearing Officer's Order in a 2003 due process proceeding between Randolph School District/Orange Southwest SU and the Parents. The District had no involvement in or responsibility for that litigation or its outcome. The Order at no time had any force vis a vis the District. At any rate, the Order was subsequently vacated by the U.S. District Court, and therefore has no legal existence - past, present or future. Benjamin v. Jacobson, 172 F.3d 144, 150 (2d. Cir. 1999); Seidman v. Green, 155 Vt. 345 (1977). An order that is vacated ceases, in effect, to have legal existence - past, present or future. I reiterate my earlier ruling that the vacated Order in the Randolph due process is irrelevant to this proceeding, and a nullity as a matter of law.

Dated at Middlebury, Vermont, this 11th day of September, 2003.


Donald R. Powers, Esquire, Hearing Officer
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